

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Acceleration of Broadband Deployment)	WC Docket No. 11-59
Expanding the Reach and Reducing the Cost of)	
Broadband Deployment by Improving Policies)	
Regarding Public Rights of Way and Wireless)	
Facilities Siting)	

**COMMENTS OF THE TENNESSEE COUNTY HIGHWAY OFFICIALS
ASSOCIATION**

The Tennessee County Highway Officials Association (“TCHOA”) files these comments in response to the Notice of Inquiry (“NOI”), released April 7, 2011, in the above-entitled proceeding. Through these comments, TCHOA seeks to provide the Commission with basic information regarding right-of-way management practices and charges in Tennessee.¹ TCHOA is filing these comments because rights-of-way are public assets that our members, as county officials, are responsible for maintaining and protecting on behalf of our local taxpayers. We believe that local officials are in the best position to enact and implement any policies regulating local rights-of-way. Local governments in Tennessee have developed considerable expertise applying the policies already in place to protect and further public safety, economic development, and other community interests. By adopting rules in this area, the Commission could disrupt this process at substantial cost to local taxpayers and to the local economy. We

¹ We use the term “charges” to include both any cost recovery that is part of right-of-way management (such as permitting fees), as well as other compensation received from utilities for use of the rights-of-way and other facilities consistent with state and local law.

believe that an honest assessment of the Commission's limited expertise on local land use matters points to the conclusion that this is no place for federal regulation. Therefore, the Commission should not interfere with the policies and procedures already in place at the state and local level.

There is no evidence that the policies in place in Tennessee with respect to placement of facilities in the rights-of-way or on public property have discouraged broadband deployment. Our communities *welcome* broadband deployment, and we are ready and able to work with any company willing to provide service. Like most of the rest of the country, Tennessee is comprised of rural areas with a few urban centers. Despite relatively light regulation of broadband facility placement within rights-of-way and on public property, broadband deployment in this state remains heavily focused on the few urban areas. Thus, it is our belief that the current regulatory scheme in Tennessee is not serving as an impediment to the proliferation of broadband in our state.

In response to the NOI, TCHOA provides the following information:

I. *Application Procedures, Forms, Substantive Requirements, and Charges.*

It is the public policy of Tennessee to allow utilities “to locate their facilities within the boundaries of public roads and streets [in this state] . . . because utilities are vital to the health, safety and welfare of the citizens of this state” Tenn. Code Ann. § 54-5-801(b). Tennessee courts have, however, found that utilities, as holders of rights-of-way easements, have “the right to use or alter the affected premises only as reasonably necessary for the use of the easement” and are “responsible for proper maintenance of what [they] put[] on the easement to facilitate [their] use of the easement.” *Yates v. Metro. Gov’t of Nashville and Davidson County*, 451 S.W.2d 437 (Tenn. Ct. App. 1969). Tennessee law specifies the rights and obligations of various types of utilities with regard to the use of public rights-of-way.

Telegraph and telephone corporations may construct their lines and necessary fixtures “along, or over, or under the line of any public highway [and] the streets of any village, town or city” as long as the public’s use of the highways and streets are not obstructed. Tenn. Code Ann. § 65-21-101. The corporations are authorized to operate and maintain their lines along the public highways and streets. Tenn. Code Ann. § 65-21-201. Cities have been specifically granted police power to regulate the construction, maintenance, and operation of any line within their limits. Tenn. Code Ann. § 65-21-103. On the county side, pursuant to § 54-7-201(c) of the County Uniform Highway Law, “transmission lines, telephone or telegraph lines or poles may be placed on and along the right-of-way of any county road under the direction and with the permission of the chief administrative officer.” In counties with zoning, counties may exercise reasonable police powers as to telephone facilities, “including, but not limited to, permit requirements, landscaping, off-street parking or set-back lines as an exercise of police powers.” Tenn. Code Ann. § 13-24-303. All counties may exercise regulatory power under the County Powers Act found at Tenn. Code Ann. § 5-1-118, which includes regulating the installation and maintenance of telephone lines and fixtures (as well as other types of utilities) in their rights-of-way and assessing penalties for noncompliance with the regulations pursuant to § 5-1-121.² With regard to telephone cooperatives, the “respective authorities having jurisdiction” over the highways or roads have the authority to designate or specify where the telephone poles will be located. Tenn. Code Ann. § 65-29-104.

²Subsequent court decisions probably place limits on this monetary penalty. See *Chattanooga v. Davis*, 54 S.W.3d 248 (Tenn. 2001). According to the Tennessee Supreme Court, a punitive fine levied by a local government cannot exceed \$50 unless the defendant is allowed to have a jury trial. Higher fines could be enforced if they are remedial in nature rather than punitive, but this distinction is difficult to make. Therefore, a county would probably limit monetary penalties to \$50 or less per violation.

Cable television and video service providers are subject to the Competitive Cable and Video Services Act of 2008. Under this Act, service providers may choose to operate under a state or a local franchise agreement. Regardless of which method is chosen, cable television and video service providers must receive the governing city, county, or state department's approval to "maintain and operate its cable over or beneath any of the public lands of this state, but not including the freeway system, which is defined as a fully-controlled access facility, or over or beneath or along any of the highways or public roads of the state." Tenn. Code Ann. § 7-59-103. Service providers must obtain a permit from the respective agency in charge of maintaining public lands, highways, public roads or waters "prior to placing its cables over, under or along the public lands, highways, public roads or waters." *Id.* Additionally, § 7-59-310 states that nothing in the Competitive Cable and Video Services Act precludes cities or counties from exercising their police powers to regulate occupants or users of their rights-of-way. Section 7-59-310(a)(3) specifically states that cable and video service providers must abide by all applicable local right-of-way ordinances and resolutions. On the state level, whenever the state determines that cable or video lines must be moved in order to service the highways or roads, this removal or relocation will occur at the expense of the company or service provider. Tenn. Code Ann. § 7-59-104. As for franchise fees, if the cable or video service provider operates under a state franchise, they must pay a franchise fee of 5% of the provider's gross revenues to the county in which they operate. If operating under a local franchise agreement, the fee would be whatever is negotiated by the parties.

Electric cooperatives are authorized to "construct, maintain, and operate electric and/or other telecommunication transmission and distribution lines or other conducting or communications facilities along, upon, under, and across all public thoroughfares, including,

without limitation, all roads, highways, streets, alleys, bridges, and causeways, and upon, under, and across all publicly owned lands; provided, that the respective authorities having jurisdiction thereover shall consent thereto.” Tenn. Code Ann. § 65-25-205(a)(11). Pursuant to § 65-25-205(a)(11), such consent shall not be unreasonably withheld or conditioned. Electric cooperatives also have the power to condemn rights-of-way for their public use. Tenn. Code Ann. § 65-25-205(a)(12)(C). Public property cannot be condemned if a court determines that it will obstruct, burden, or unduly inconvenience the continued public use of the property. *Id.* Electric cooperatives may also “[p]urchase or otherwise acquire, and own, lease as lessor or lessee, lease back, hold, use, and exercise, and sell, assign, transfer, convey, mortgage, pledge, hypothecate, or otherwise dispose of or encumber, franchises, rights, privileges, licenses, rights-of-way, and easements.” Tenn. Code Ann. § 65-25-205(a)(4). In addition, the State Rural Electrification Authority has the power to “[u]se any right-of-way, easement or other similar property right necessary or convenient in connection with the acquisition, improvement, operation or maintenance of a system or systems, held by the state or any political subdivision thereof; provided, that the governing body of such political subdivision shall consent to such use.” Tenn. Code Ann. § 65-23-106(8).

From the preceding discussion of Tennessee rights-of-way law, it is clear that the Tennessee legislature has provided local governments with regulatory authority over local rights-of-way. It should be noted, however, that in Tennessee, local governments, specifically counties, have not exercised this regulatory authority to the detriment of utility service providers. The

following is a summary of requirements for utility operators to perform construction or excavation in the rights-of-way of the following counties³:

Counties	Requirements
Benton	Submit proposal for location of utilities and manner of installation; complete “Application and Utility Use and Occupancy Agreement”.
Blount	Obtain permit.
Bradley	Submit plans or sketch showing location and reference of all work to be done; obtain permit.
Crockett	Obtain permit.
Cumberland	Obtain permit.
Fayette	Submit proposal for location of utilities and manner of installation; complete “Application and Utility Use and Occupancy Agreement”.
Marion	Sign agreement.
Maury	Obtain permit.
Metro Nashville	Obtain permit. Permit holders must warrant workmanship for one year from the date of final inspection. A Tennessee One-Call ticket number is required for a permit. Excavations, trench cuts, and surface cuts must adhere to utility cut guidelines and specifications.
Rhea	Obtain written permit number.
Roane	Complete “Occupancy Agreement”.
Warren	Complete “Application and Utility Use Occupancy Agreement”.
Washington	Obtain construction permit. Permit includes installation specifications.
Williamson	Obtain permit. Must have surety bond in an amount determined by the highway superintendent.

From our survey of our member counties, it appears that most only require a permit or some type of fairly straightforward agreement. Most do not even charge a permit (or application) fee. Cable and video service providers are subject to franchise fees and local taxes

³ This list is not exhaustive. It is a compilation of responses to a request made by TCHOA received from county highway officials.

and fees of general applicability. Utilities could be assessed costs for repairing damage to rights-of-way caused by the service provider; however, it is our understanding that such costs are not frequently assessed in Tennessee. Rather, the utility makes the repairs itself. Thus, onerous paperwork and cost prohibitive fee schedules are not an issue in our state.

II. *Sources of Delays.*

The Commission asks what factors are chiefly responsible to the extent applications are not processed in a timely fashion. The Commission also asks about errors or omissions in applications.⁴

We believe most applications are processed in a timely manner in our local communities. We do not believe most local communities within Tennessee have lengthy approval processes. In some of our more rural areas, there is no approval process at all. If there are significant delays, it is likely because it is a large project or because parties are trying to comply with other regulations, such as Tennessee's Underground Utility Damage Prevention Act.⁵

III. *Improvements.*

The Commission asks whether there are particular practices that can improve processing.⁶

There are a number of practices that utilities could undertake that would improve not only the permit process but the overall right-of-way management process as well. These include:

- (1) Getting the local government involved in the early planning stages of the project;

⁴ *Id.*

⁵ T.C.A. § 65-31-101 *et seq.*

⁶ NOI ¶¶ 14, 29.

- (2) Providing the local government with detailed utility locations and relocations;
- (3) Complying with all applicable construction and safety standards when undergoing projects within the right-of-way and providing construction inspectors to oversee the projects;
- (4) Providing local officials with appropriate service provider contacts to address issues arising after the project is complete;
- (5) Maintaining the equipment once it is installed; and
- (6) Posting surety bonds.

On our members' part, some practices that improve the process include having the permitting paperwork readily available to applicants, ensuring that the office staff is familiar with the permitting process and able to assist applicants with any questions they may have, and placing regulations on our county websites or at least having those regulations readily available to applicants in our county offices.

IV. *Permitting Charges.*

The Commission seeks data “on current permitting charges, including all recurring and non-recurring charges, as well as any application, administrative, or processing fees.” Specifically, the Commission asks commenters to identify:

- the type of facilities for which such charges are assessed;
- how such charges are structured (e.g., per foot or percent of revenue in the case of rights-of-way fees);
- whether the community is subject to comprehensive state franchising or rights-of-way-laws;

- whether the charges are published in advance or individually negotiated, designed to approximate market rates or merely recover costs (direct and/or indirect), and accompanied by comprehensive terms, and conditions; and
- the value of any in-kind contributions required for access or permit approval.

The Commission further asks whether such charges are related to impacts on the local community, such as pavement restoration costs for projects that involve trenching in roadways.⁷

As previously discussed, most counties in Tennessee charge utilities only a nominal permitting fee—if they charge a fee at all. This permitting fee is purely administrative. State law does address use of local rights-of-way by various types of utilities and authorizes local governments to regulate such use. Cable and video service providers have the option of operating under a statewide franchise or a local franchise. If operating under a statewide franchise agreement, the cable or video service provider is subject to a 5% franchise fee. The fee is negotiated if operating under a local agreement. Utilities could be assessed costs for repairing damage to rights-of-way, but it is our understanding that this is not done frequently. Typically, the utility is asked to make the repairs itself. As for in-kind contributions, under the Competitive Cable and Video Services Act, cable providers are required to provide PEG services or fees and to either provide free cable service to government and school buildings or pay counties one-half of the published rate of the cable provider providing free services.

V. *Local Policy Objectives.*

The Commission asks what “policy goals and other objectives” underlie the local practices and charges in this area.⁸

It is our belief that Tennessee’s policies are designed to achieve the following:

⁷ NOI ¶ 17.

⁸ NOI ¶ 22.

- (1) Facilitate the responsible deployment of services and make the services broadly available;
- (2) Ensure public safety;
- (3) Avoid traffic disruption;
- (4) Maintain and repair roadways;
- (5) Prevent public disruption and damage to abutting property;
- (6) Minimize accelerated deterioration to roads that accompanies road cuts;
- (7) Satisfy aesthetic, environmental, or historic preservation concerns;
- (8) Avoid damage to the property of others; and
- (9) Obtain fair compensation for use of public property.

VI. *Possible Commission Actions.*

Finally, the Commission asks what actions the Commission might take in this area.⁹

As noted above, TCHOA strongly urges the FCC to refrain from regulating local right-of-way management processes. We believe federal regulation in this area usurps state and local autonomy and circumvents local government property rights. The development of right-of-way management procedures is a highly fact-specific matter, which turns on local engineering practices, local environmental and historical conditions, local traffic and economic development patterns, and other significant community concerns and circumstances. Imposing a federal regulatory regime would create unnecessary costs for local communities, and would have the potential to undermine important local policies. If the Commission feels compelled to act in this area at all, it should limit itself to voluntary programs and educational activities, and to implementing its own recommendations in the National Broadband Plan for working cooperatively with state and local governments.

⁹ NOI ¶ 36.

CONCLUSION

TCHOA urges the Commission to conclude that right-of-way management and charges are not impeding broadband deployment. As indicated above, Tennessee's policies and procedures are designed to protect important local interests, and have done so for many years. There is no evidence that the policies have impaired any company from providing broadband service here, and there are many reasons to believe that federal regulations would prove costly and disruptive to our local communities.

Respectfully submitted,

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Association

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